United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1430

To be argued by
PAUL VIZCARRONDO, JR.

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1430

UNITED STATES OF AMERICA,
Appellee,

—v.—

JAMES GRANT,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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—v.—

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Preliminary Statement

James Grant appeals from a judgment of conviction entered on October 15, 1975, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Superseding Indictment 75 Cr. 922,* filed on September 17, 1975, charged James Grant with five counts of

* Indictment 75 Cr. 133, filed on February 6, 1975, charged Grant with one count of possessing with intent to distribute 5.38 grams of cocaine. It was superseded by Indictment 75 Cr. 400, filed on April 17, 1975, which charged Grant with one count of possessing with intent to distribute 440.69 grams of cocaine and five counts of using a firearm to commit a federal felony. That indictment was in turn superseded by Indictment 75 Cr. 922, which divided the 440.69 grams of cocaine into five counts and which was filed in response to the defendant's motion to dismiss count one of Indictment 75 Cr. 400 as being duplicitous. (*See* Pre-Trial Hearing Tr. 2).

possessing with intent to distribute cocaine, in violation of Title 21, United States Code, Section 841(a)(1), and five counts of using a firearm to commit a federal felony, in violation of Title 18, United States Code, Section 924(c)(1). Trial commenced on September 22, 1975, and concluded on September 24, 1975, when the jury found the defendant guilty on count one of simple possession of cocaine, on counts two, three and four of possessing with intent to distribute cocaine, and on counts six through ten of using a firearm to commit a federal felony.*

On October 15, 1975, Judge Metzner sentenced Grant to concurrent terms of imprisonment of six months on count one and of two and one-half years on counts two, three, four and six through ten. Grant was also placed on special parole for three years on each of counts two, three and four, to run concurrently with each other and to commence upon the expiration of his confinement.

Statement of Facts

The Government's Case

The Piggy Back Social Club was an after-hours club located on the second floor of 1-9 East 167th Street in the Bronx. The front door of the building could be unlocked from the second floor by means of a buzzer mechanism. Two hallways converged at the top of the stairs that led to the second floor. One of the hallways went straight ahead to the back of the club. At the end of that hallway was the kitchen, restrooms, and another back room. The other hallway went off to the left and had several doors off of it. The first door was marked "I" and underneath that "Jay Mod" (this room will hereinafter be referred to as "Room I"). The door next to it was marked "II" (hereinafter "Room II"), and further down this

* The defendant was acquitted on count five.

hallway was a door marked "IV" (hereinafter "Room IV"). Across the hall from Room I was a door that was marked "V" and underneath that "Piggy Back Social Club" (hereinafter "Room V"). This room contained the bar area of the social club (Tr. 13, 15, 125; GX 46, 51, 52, 53).

The doors to Rooms I, II and V were each constructed of solid wood with a sheet of metal on each side, and were further secured by a box-type double-bar lock that extended the entire width of each door and at least two inches into both sides of the door frame. In addition, the door to Room I had a double-bolted deadlock. All key cylinders were secured by a hardened case metal plate to prevent them from being pulled. The door frames were solid steel and were set in concrete walls (Tr. 148).

A television camera located at the top of the landing to the second floor was aimed at the building's front door. Other television cameras pointed at the doors to Rooms I and V. Room I contained a four-screened television monitor, and another television screen was placed opposite the bar in Room V (Tr. 56-58; GX 46-49).

On the morning of January 22, 1975, special agents of the Drug Enforcement Administration ("DEA") and the Bureau of Alcohol, Tobacco and Firearms ("ATF"), accompanied by officers of the New York City Police Department, entered the premises at 1-9 East 167th Street for the purpose of executing a federal search warrant for Room I that had been issued the previous day.* The agents encountered several men loitering on the second

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* The affidavit for the search warrant was based on information received from a reliable informant that a machine gun was concealed in Room I. In addition, the informant had told DEA Special Agent Philip W. Bellini "that there were drugs being brought into the club and that Mr. James Grant, also known as Uncle Jim, was distributing the drugs to members of the club." (Pre-Trial Hearing Tr. 6).

floor landing, and one of the agents asked for the manager. A few moments later Grant appeared, walking down the hallway from the back of the club. Grant identified himself and was asked if he was in charge of the whole area, to which he replied, "Yes, I'm the manager of the club." An agent told Grant that they were there looking for a fugitive, and asked if they could step into an office and talk, as there were so many television cameras looking down at where they were standing. Grant agreed, took out a set of keys and unlocked the door to Room I, which he and several agents entered (Tr. 13-14, 18-19).

Inside Room I, an agent told Grant that they were really there to execute a federal search warrant for Room I. As Grant sat down, the agent saw in his shirt pocket a cellophane bag containing white powder. The agent pulled the bag out of the pocket and asked Grant what it was. Grant replied that it was cocaine for his use. The agent placed him under arrest and advised him of his constitutional rights (Tr. 20-21). The white powder was later determined to be 5.38 grams of 61.2 per cent cocaine hydrochloride, and was the cocaine charged in count one of the indictment (Tr. 282).* In searching Grant subsequent to his arrest, the agents also took from his person a dollar bill containing traces of cocaine (Tr. 31, 285), and his set of keys (Tr. 37-38).

Room I was divided into two smaller rooms by a wall that had an opening with no door. As the agents began searching Room I, Grant, in response to a question, stated that the room was his office. He said that he also lived there, and that he slept on a couch in the inner room of Room I. As the agents searched Room I, they found 3.03 grams of cocaine in a desk drawer (count two) (Tr. 27-

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* Special Agent Samuel C. Meale, DEA, testified that when cocaine is consumed, it is normally snorted in amounts about the size of a match head—less than one gram—and at about twenty to thirty percent purity (Tr. 181-82).

28, 284); a loaded Dan Wesson .357 magnum revolver in a steel credenza (count six); a loaded Winchester 30-30 caliber automatic rifle under cushions on the couch where Grant stated he slept (count seven); a loaded Plainfield .30 caliber semi-automatic pistol behind the same couch (count nine); and a loaded .45 caliber Remington semi-automatic pistol, with an extra clip of ammunition, in a desk drawer (count eight). They also found in the steel credenza 120 rounds of ammunition for the various guns they had seized (Tr. 137-38, 143-45). Among the other items seized from the room were several packages containing almost 1500 grams of phenylpropanolamine hydrochloride, and a package containing 20.40 grams of a mixture of boric acid and tetracaine (Tr. 31-34, 35, 285-86).*

During the search of Room I, one of the agents noticed a small hole in one of its walls. Peering through it, he was able to see into the adjoining room, Room II, and observe a table with cellophane bags and a strainer on it. One of the agents left the premises and returned later that day with a search warrant for Room II. The agents used Grant's keys to unlock and open the door to Room II (Tr. 38-40). The ensuing search of that room—a room which served no apparent purpose and contained some desks and tables—turned up a total of 226.26 grams of cocaine in two packages in a desk drawer (count three) (Tr. 41-42, 284), and a Sturm Ruger .357 magnum revolver, also in a desk drawer (count ten) (Tr. 142). Other items seized from the room included a strainer and approximately 155 grams of starch (Tr. 43, 286).**

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* Both of these substances are white powders and are the types of materials that Special Agent Meale testified are used to "cut," or dilute, cocaine (Tr. 182-83).

** Special Agent Meale testified that starch is also commonly used to cut cocaine (Tr. 182-83). Special Agent Daniel Fernandez, DEA, testified that strainers are used in the process of cutting narcotics (Tr. 222-23).

Later that evening, an individual named Mr. Brown entered the premises of the club and told the agents that he used to live there. He led the agents to a back room by the kitchen; the door to that room was secured by two locks. Brown had a key only to one of the two locks and had to hit the door with shoulder to open it, jarring loose the framework in the process. This room, like Room I, was divided into two smaller rooms. Brown, followed by an agent, walked directly to the inner room and retrieved some personal belonging. Meanwhile, in the outer room—which served no apparent purpose and contained an odd cabinet or two—agents observed in plain view, and seized, a total of 178.45 grams of cocaine in three packages (count four), as well as approximately 330 grams of marijuana, strainers, a scale, quantities of lactose and dextrose, and other items (Tr. 209-17, 222-24, 284, 286).*

One of the agents also used Grant's keys to unlock and open the door to Room IV on that same evening. A search of that room—which contained a bar, mirrored walls and apparently served some unspecified club purpose (Tr. 95, 189)**—uncovered a total of 25.57 grams of cocaine (count five) and approximately 114 grams of marijuana.***

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* Special Agent Fernandez testified that strainers, scales, lactose and dextrose are all used in the process of cutting narcotics (Tr. 222-24).

** The jury's acquittal of Grant with respect to the cocaine seized in Room IV (count five) may reflect its finding—given the somewhat elaborate, if not bizarre, decor of that room—that in contrast to Room II and the back room by the kitchen, both characterized by barren decor, club members generally had access to and made use of Room IV.

** When the agents first entered Rooms I, II, IV and the back room by the kitchen, none of those rooms contained any people. When the agents first entered the premises at 10:30 A.M., people could be heard inside Room V, the bar area. The

[Footnote continued on following page]

The Defense Case

The defendant called one witness, Special Agent James Forget of DEA. Agent Forget testified that on January 31, 1975, he returned three keys to Grant that had been taken from his person at the time of his arrest. On cross-examination, he testified that the keys were car keys that Grant had requested to have returned (Tr. 287-91).

ARGUMENT

POINT I*

The circumstantial evidence presented by the Government was sufficient to support Grant's convictions for using a firearm to commit a felony.

Grant contends that the Government's theory at trial on Counts Six through Ten, and one which the trial court improperly permitted the jury to consider, was that "the mere hidden presence of the guns in Room I constituted the requisite use of them to commit the underlying

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door to Room V was locked and remained so until about 1:00 P.M., when officers of the New York City Police Department, using the defendant's keys, unlocked the door and advised the persons inside that the club was closed and they were to come out one at a time (Tr. 101, 129-30).

* Since Grant does not seek to overturn on appeal his conviction on count two (see, *infra*, p. 13*), for which he was sentenced to two and one-half years in prison (the maximum sentence he received on any count), and since Judge Metzner imposed all sentences in this case to run concurrently, this Court may, in its discretion, decline to review the issues raised by Grant on this appeal and affirm his conviction. *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *United States* v. *Neville*, 516 F.2d 1302, 1307 n.6 (8th Cir. 1975); *United States* v. *Keller*, 512 F.2d 182, 185 n.8 (3d Cir. 1975); *United States* v. *Bath*, 504 F.2d 456, 457

[Footnote continued on following page]

Federal felony," possession of cocaine with intent to distribute it (Grant Br. at 13, 20-21). Relying on extensive citations to and quotations from the Congressional Record, he argues that this theory is insufficient to support his convictions on these counts. Grant misconstrues the Government's evidence and the theory of its case.

From his recital of section 924(c)'s legislative history, Grant concludes that when Congress inserted the word "uses" in section (c)(1) it meant just that, and not "possesses," "carries," "intends to use," "might use" or other such words (Grant Br. at 23). The Government does not quarrel with that conclusion. We part ways with Grant, however, regarding what conduct constitutes "use" of a firearm to commit a federal felony. Grant contends that the word "uses", as employed in 18 U.S.C. § 924(c)(1), includes only "positive, aggressive act[s]" (Grant Br. at 15), and further contends that since the Government presented "no evidence that the guns were ever employed—exhibited, drawn, pointed, fired—in any period of possession of drugs, to aid that possession, or to aid intended sales" (Grant Br. at 19), his convictions on counts six through ten must fall. Grant's stipulated

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(10th Cir. 1974); *Ethridge* v. *United States*, 494 F.2d 351 (6th Cir.), *cert. denied*, 419 U.S. 1025 (1974); *United States* v. *McLeod*, 493 F.2d 1186, 1189 n.1 (7th Cir. 1974). Similarly, this Court may decline to review Grant's convictions under section 924(c)(1) if it affirms one or both of the narcotics convictions that he attacks on this appeal, as such an affirmance would result in his conviction of multiple separate offenses. There is nothing in the United States Board of Parole's guidelines for parole release consideration indicating that a prisoner who is a multiple separate offender will be adversely affected in his parole applications because his offenses involved two different types of crimes. See Adult Offenses Severity Chart n.4, 28 C.F.R. § 2.20. Moreover, it appears that under the parole guidelines, Grant's narcotics convictions would be classified as "very high," while his firearms convictions would be classified as "moderate."

meaning of the term "uses", however, is at odds with the plain meaning of section 924(c)(1) from which it is drawn and with every day common usage. Had Congress intended by section 924(c)(1) to proscribe only such uses of firearms wherein they were "exhibited, drawn, pointed [or] fired" (*id.*), it could easily have so provided. Instead, it chose not to qualify the term "uses" in any fashion nor to limit the applicability of section 924(c)(1) to certain specified, violent felonies only. Indeed, by including within the scope of section 924(c)(1), as predicates, the broad range of non-violent felonious conduct proscribed by federal law—including possessory offenses, as here—Congress necessarily contemplated that that section would reach all of the multitudinous "uses" of lethal firearms to commit a crime which human ingenuity could devise.* Accordingly, an offense under section 924(c)(1) was clearly proved here where the jury could properly have found that Grant had loaded and deployed a virtual arsenal of firearms in and about a premises containing a sizeable narcotics mill and distribution operation in order to render secure and protect the cache of cocaine, as well as the individuals who may have worked in the mill, from unauthorized intrusions and "rip-offs" (see Tr. 279).

Contrary to Grant's assertion, the Government did not prove only the "mere hidden presence" of the firearms on the premises. The evidence showed that large amounts of cocaine, totaling nearly a pound, and cutting materials were secreted in four rooms of the Piggy Back Social Club, including the two rooms in which the firearms were found. It was thus evident that a large-scale narcotics mill and distribution operation was established on

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* *Cf. Barrett* v. *United States*, — U.S. —, 44 U.S.L.W. 4050, 4052 (Jan. 13, 1976) and *United States* v. *Powell*, — U.S. —, 44 U.S.L.W. 4010, 4011 (Dec. 2, 1975) (in both of which the Supreme Court refused to give, absent evidence of congressional intent that it should, a narrow reading to the terms of other firearms provisions, 18 U.S.C. 922(h) and 18 U.S.C. § 1715, respectively, whose meanings were plain).

the premises. It was equally evident that this operation was tightly protected. Television cameras—one of the monitors for which was found in Grant's room—screened persons coming into the club; and the doors to the rooms were extraordinarily well secured. Under all these circumstances, the logical inference that the jury properly could and did draw was that the firearms found on the premises were not there merely for safekeeping or as part of a gun enthusiast's collection, but were used and constituted one facet of an elaborate security arrangement designed at least in part to make secure and protect Grant's narcotics distribution operation—to further his possession of the cocaine with intent to distribute it.*

The guns, after all, were found fully loaded and in close proximity to the quanties of narcotics seized from two of the rooms. And notwithstanding Grant's current assertion that the guns were "in places not easily available" to him (Grant Br. at 23), four of the five guns seized were taken from Grant's own office and living quarters, and one of the four was taken from under the cushions of the very couch on which Grant slept. The fifth gun was seized from a desk in the room immediately adjoining Grant's room—a room to which Grant's keys provided access and one into which Grant could peer from his office by reason of a hole in the wall separating the two. The loading and deployment of these firearms so that they were near to the drugs in question and within Grant's reach hardly constitutes a showing only of mere possession.

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* One who trafficks in substantial and valuable quantities of cocaine has a peculiar need to protect that cache of contraband from robbery and other non-consensual takings by the show or fact of armed force since, of course, he is unable to call or rely on the orderly processes of law either to deter such takings or to recover his goods following any such taking.

In *United States* v. *Bowles*, 428 F.2d 592, 597 (2d Cir. 1970), this Court stated the proper standard for evaluating the evidence in this case:

> "[C]ircumstantial evidence is of no less probative value than testimonial evidence. Given either type of evidence, a jury, if properly instructed as to reasonable doubt, is not foreclosed from drawing upon its common experience with persons and events. The question is always whether the jury may rationally and logically infer the ultimate fact to be proved from basic facts, whether established by circumstancial or testimonial evidence, and the surrounding circumstances of the case."

See United States v. *Glasser*, 443 F.2d 994, 1006-07 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971); *United States* v. *Grunberger*, 431 F.2d 1062, 1066 (2d Cir. 1970); *United States* v. *Aadal*, 368 F.2d 962, 964 (2d Cir. 1966), *cert. denied*, 386 U.S. 970 (1967); *United States* v. *Schipani*, 362 F.2d 825, 830 (2d Cir.), *vacated on other grounds*, 385 U.S. 372 (1966); *cf. United States* v. *Taylor*, 464 F.2d 240, 244-45 (2d Cir. 1972).*

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* Judge Metzner clearly and correctly instructed the jurors on the inferences they could but need not draw from the evidence in deciding the defendant's guilt on counts six through ten.

> "Now, as to the first element, the defendant must have used the firearm alleged in the count. When I say 'used,' I do not imply that the firearm had to be fired or even necessarily carried but only that the defendant had the firearm to further the commission of the crime of possessing cocaine with intent to distribute it. In this connection, you may infer, if you wish, that the firearms were used to aid the defendant in his possession of the cocaine with intent to distribute.
>
> "As I have said, you may draw this inference to satisfy this element of the crime. However, if you decide not to draw the inference, then you should acquit the defendant on these counts" (Tr. 358-59).

Judge Metzner also properly charged the jury on circumstantial evidence (Tr. 361-63) and reasonable doubt (Tr. 350-53).

Grant's criticism of Judge Metzner's reliance on *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States* v. *Cannon*, 472 F.2d 144 (9th Cir. 1972); and *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), in denying Grant's motion for a judgment of acquittal on counts six through ten is misplaced. Each of those cases deals with the admissibility of evidence of the defendant's possession of certain items to prove an element of the crime charged.*

The relevance of those cases is not that they indicate that Grant's mere possession of the firearms is sufficient alone to sustain his convictions under section 924(c)(1), but that the circumstances of his possession of the firearms are relevant to the issue of whether they were used to commit the narcotics felonies. These circumstances, to which reference has already been made, are sufficient to sustain Grant's section 924(c)(1) convictions.**

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* Thus in *Cannon*, the court ruled that, where a defendant was charged with possessing narcotics with intent to distribute them, evidence that at the time of his arrest he was in possession of a firearm is relevant and admissible on the issue of the defendant's intent. "It may reasonably be inferred that an armed possessor of drugs has something more in mind than mere personal use." 472 F.2d at 145.

** Assuming *arguendo* that Grant's convictions on counts six through ten should be reversed, the case need not be remanded for resentencing on the remaining counts. Contrary to Grant's contention (Grant Br. at 23-24), Judge Metzner did not impose the sentences he did on counts one through four because he believed Grant had used the firearms in a prohibited manner. Rather, he was influenced by the simple fact that Grant had possessed such potent weapons (Tr. 387-88). This was a matter that he properly could have considered in imposing sentence on counts one through four regardless of whether or not Grant had been convicted on counts six through ten. See *United States* v. *Schweig*, 454 F.2d 181, 183-84 (2d Cir. 1972).

POINT II

The Government's evidence was more than sufficient to prove beyond a reasonable doubt Grant's constructive possession of the drugs in Room II and the back room by the kitchen.

Grant argues that his convictions on counts three and four must be reversed because the evidence at trial was insufficient to prove beyond a reasonable doubt his possession of the cocaine found in Room II and the back room by the kitchen.* This argument is meritless.

Constructive possession has been defined by this Court as being "such a nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it

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* In his brief, Grant incorrectly identifies count four as having encompassed the drugs found in Room IV, when in fact that count covered the 178.45 grams of cocaine seized from the back room by the kitchen. The jury acquitted the defendant on count five, which charged him with the drugs in Room IV.

Grant does not argue anywhere in his brief that his conviction on count two of possessing with intent to distribute the 3.03 grams of cocaine found in the desk drawer of Room I—where he lived, slept and kept his office—should be reversed. In the brief's concluding paragraph, however, he asserts that "[f]or the above-stated reasons . . . Counts Two through Four [should be] dismissed . . ." (Grant Brief at 28) (emphasis added)—without ever having stated a reason for count two's dismissal or reversal. In any event, Grant failed to move at trial for a judgment of acquittal on count two because of insufficient evidence of his possession of the narcotics charged in that count, and thereby waived any such claim on appeal (Tr. 269). *United States* v. *Larson*, 507 F.2d 385, 387 (9th Cir. 1974); *United States* v. *Ross*, 477 F.2d 551 (6th Cir.), *cert. denied*, 414 U.S. 912 (1973); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Viale*, 312 F.2d 595, 601 (2d Cir., *cert. denied*, 373 U.S. 903 (1963).

were actual possession." *United States* v. *Casalinuovo*, 350 F.2d 207, 209 (2d Cir. 1965). "Proof of the connection of an exhibit [here cocaine] may be made by circumstantial, as well as direct evidence. The prosecution need only prove a rational basis from which the jury may conclude that the exhibit did in fact belong to the . . . [defendant]." *United States* v. *Natale*, Dkt. No. 75-1276 (2d Cir. Nov. 28, 1975), slip op. 793, 811. See Rule 901(a), Fed. R. Evid. Here a sufficient connection between Grant and the drugs in Room II and the back room was clearly established. Grant admitted that he was in charge of the entire club area and that he lived in Room I, which was also his office. Cocaine was found on his person and in his living quarters and office. Also found in his office were large amounts of cutting materials and four firearms. The agents entered Room II with Grant's key, and there is no evidence that any other key to Room II existed. See *United States* v. *Heiden*, 508 F.2d 898, 902 (9th Cir. 1974); *United States* v. *Ramos*, 476 F.2d 624, 626 (9th Cir.), *cert. denied*, 414 U.S. 836 (1973). They did so because, like Grant, they were able to observe from Grant's Room, Room I, via a hole in the wall, numerous cellophane bags and a strainer in plain view on a desk top in Room II. In that room they again found both cocaine and cutting materials. The evidence that the cocaine in this room was under Grant's dominion and control is overwhelming.

As for the drugs found in the back room by the kitchen, when the agents first saw Grant he was walking away from the area of that room. While the agents did not have an opportunity to try Grant's keys on the locks to the room's door, a lock had to be forced open for the agents to enter the room, and in it they found yet a third time both cocaine and cutting materials, as well as cutting equipment. Again, there was no evidence that anyone else had had access to that room since the door's second lock had been installed. What the jury could and

did find from the evidence was that Grant—the manager of the club, who had contraband on his own person and in his own office—was operating a sizable narcotics mill and distribution operation on the premises, and that the cocaine and cutting material stored in the back room—as well as in Room II—were under his dominion and control as part of his operation. *See United States* v. *Luciow*, 518 F.2d 298, 301 (8th Cir. 1975); *United States* v. *Hutchinson*, 488 F.2d 484, 488-89 (8th Cir. 1973), *cert. denied*, 417 U.S. 915 (1974); *United States* v. *Casalinuovo*, 350 F.2d 207, 209-211 (2d Cir. 1965).*

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* Grant incorrectly states that in *Casalinuovo*, the defendant was the only person who had access to the room in question. *See* 350 F.2d at 209. In the instant case, there was no evidence that anyone other than Grant had access to Rooms I, II, IV and the back room. *United States* v. *Infanti*, 474 F.2d 522 (2d Cir. 1973); *United States* v. *Steward*, 451 F.2d 1203 (2d Cir. 1971); *United States* v. *Kearse*, 444 F.2d 62 (2d Cir. 1971); and *United States* v. *Febre*, 425 F.2d 107 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970), also relied on by Grant, do not aid his argument. Those cases involved situations where the evidence against the defendant established little more than his mere presence in the same area as contraband. In the instant case, the evidence tying Grant to the narcotics was substantially greater than that, and Judge Metzner properly instructed the jury that the defendant's mere presence where narcotics were found would not be sufficient to convict (Tr. 356).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Paul Vizcarrondo, Jr., being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15th day of March, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Phyllis Sklout Bamberger, Esq.
Federal Defenders Services Unit
509 United States Courthouse
Foley Square
New York, New York
10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Paul Vizcarrondo, Jr.

Sworn to before me this
15th day of March, 1976

Mary L. Avent

MARY L. AVENT
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No. 03-4509237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977